

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1079

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

DOCKET NUMBER 77-1079

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OTTO SCHMANSKI and PETER
DI GIOVANNI,

Defendants-Appellants.

On appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLANT OTTO SCHMANSKI

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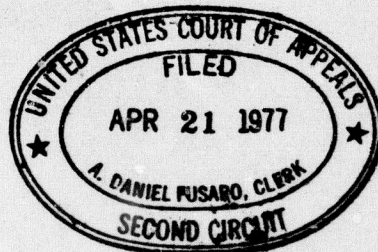


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Defendant-Appellant.

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BRIEF FOR APPELLANT OTTO SCHMANSKI

STATEMENT OF THE ISSUES

1.

Whether the properly admitted evidence of forcible breaking was sufficient to sustain defendant-appellant Otto Schmanski's conviction of conspiracy and forcibly breaking into a post office with the intent to commit a larcency or other depredation.

2.

Whether the improper receipt in evidence of the non-expert opinion of a lay witness that the door had been "jimmied," and of the content of a hearsay label, attached to an exhibit, that unwarrantedly substituted for the missing expert testimony, require reversal of appellant's conviction.

STATEMENT OF THE CASE

This is an appeal from the judgement of conviction entered in this action on January 21, 1977, against defendant-appellant Otto Schmanski. On November 22, 1976, Schmanski was tried with a co-defendant, Peter DiGiovanni, before the Hon. Jack B. Weinstein and a jury, in the United States District Court for the Eastern District of New York, on a two count indictment, No. 76 Cr. 530. Count one charged both defendants with forcibly breaking into the United States Post Office at Eltingville, 4455 Amboy Road, Staten Island, New York, on May 22, 1976, with intent to commit a larceny or other depredation, in violation of 18 U.S.C. §§ 2115 and 2.

Count two charged both defendants with conspiracy to commit the substantive offense, in violation of 18 U.S.C. §371.

At the conclusion of a one day trial, the jury returned a verdict of guilty on each count against both defendants. On January 21, 1977, Schmanski was sentenced to consecutive terms of imprisonment of five years on each count and continued on bail pending appeal.

STATEMENT OF FACTS

On Saturday, May 22, 1976, the U. S. Post Office branch at 4455 Amboy Road, Eltingville, Staten Island, New York, was closed at 12 noon. The last postal employee to leave, Thomas Trabosci, testified that when he left, the post office was in good order, the walls were not ripped and the safe had not been broken into (A-16-18)*.

At about 10:30 P. M., an alarm originating at the Eltingville station, was received by Sgt. Edward McDermott of the U. S. Postal Inspection Service, the security supervisor on duty, at the Brooklyn Postal Station. Sgt. McDermott called two men, got the keys to the Eltingville station and responded to the alarm. Upon arrival he observed that a partition wall had been pulled away, ripping some wires and causing the alarm which could not be heard inside the post office (A-22-24).

*"A-" followed by numerals refers to page numbers of appellants' joint appendix.

Robert Seton-Harris, a New York City police officer, testified that on May 22, 1976 between 10-10:30 P. M., while in a patrol car with Officer Leonard Ames, a radio call was received as a result of which they proceeded to the Eltingville Post Office. Upon arrival, Officer Ames went to the front of the post office and Officer Seton-Harris proceeded along the side of the building toward the side door (A-28-29). Seton-Harris testified initially, that while proceeding along the walkway he saw two figures emerge from the side door, jump over a fence and head toward a wooded area. At the time he made these observations he was approximately forty feet from the two figures. He ran to his right, toward the wooded area, caught the defendant Schmanski, placed him under arrest and removed a pair of work gloves from him (A-31-32). He walked across the field with Schmanski and met Officer Ames who had arrested DiGiovanni. They returned with their prisoners to the patrol car (A-33-34). Seton Harris inspected the postal station and found that the fence in the rear had been cut to allow somebody to get through and the side door had been "jimmied." A piece of panel board had been broken away from the lower part of a wall, next to the door of a safe, inside the post office (A-35), where a

canvas bag full of assorted tools was found. A large crow bar, a wire cutter, a three pound hammer, a drill, a hacksaw, a small pry bar, ten drill bits, five punches, two knives, and four cold chissels were recovered, vouchered and received in evidence at the trial. The pry bar was found "right at the hole in the fence," nowhere near where Schmanski was arrested. (A-71-72).

Officer Seton-Harris testified that when he saw the two men emerge from the post office, there were no lights illuminating the area and he could not see their faces (A-40). He could not identify DiGiovanni as being one of the men that came out of the post office (A-42). He recalled seeing a third figure leave the post office through peripheral vision, but he never took his eyes off the two men he was chasing (A-41, 49). As he apprehended Schmanski, the second man reached the woods and escaped (A-46). Schmanski was never seen in possession of the prybar or any other tool, nor was he seen entering the post office building (A-47-48).

Leonard Ames, a retired New York City police officer, testified that on May 22, 1976, at about 10:30 P. M. while on duty in a patrol car with officer Seton-Harris, a call was received on the police phone, as a result of which

they responded to the Eltingville post office. After checking the front door, which he found secure, he proceeded around the side of the building toward Seton-Harris. As he approached, Seton-Harris ran off in the dark. When Ames was alongside the building, he observed a man wearing old clothes on the ground, in a prone position, his body coming halfway out of a hole in the fence (A-67-9,80). When he first observed the man he was about 15 to 20 feet from him. Proceeding with his gun out, he told the man later identified as Peter DiGiovanni, "Don't move or I'll shoot you". DiGiovanni said "Don't get nervous", and Ames replied, "I'll get nervous because I'm retiring next week" (A-68-9, 86). After DiGiovanni and Schmanski were put in the patrol car, Ames and another officer found a pry bar and a set of bolt cutters near the hole in the fence where DiGiovanni was apprehended (A-71-72). According to Officer Ames, an examination of the postal station revealed marks around the lock of the side door (which are not reflected in the photograph of the door in evidence) and numerous tools on the floor about three feet from a hole in a wall where a piece of sheetrock had been cut (A-73-75).

Ames never saw anyone come out of the post office or jump over the fence (A-81-82, 88).

On cross examination, Ames testified that DiGiovanni was lying prone in the grass, outside the fence, next to the hole, and that he didn't see him crawl through the hole (A-82-84).

Postal Inspector James Cole testified that his examination of the post office revealed that the wall next to the vault area had been stripped and the paneling pulled away (A-94) and that five work type gloves had been recovered, a green pair, a brown pair, and an individual brown glove concerning which he was uncertain if it had been taken from DiGiovanni or if he had found it on a bench in a detention cell at the Police Station (A-100-101).

At the conclusion of the presentation of the Government's evidence motions to dismiss both counts of the indictment were denied (A-102-3). Both defendants rested without adducing any evidence and Schmanski's counsel informed the court that he was requesting a circumstantial evidence charge (A-104).

After the guilty verdict, motions to set aside the verdict as against the weight of the evidence and as contrary to law and for a judgment of acquittal were denied (A-119).

ARGUMENT

POINT I

APPELLANT'S CONVICTION MUST BE REVERSED AND A NEW TRIAL ORDERED BECAUSE LEGALLY SUFFICIENT PROPERLY ADMISSIBLE EVIDENCE OF A FORCIBLE BREAKING WAS NOT OFFERED. ON THE FACTS OF THIS CASE, THE PROSECUTOR COULD HAVE SUSTAINED HIS BURDEN ONLY BY EITHER PROVING IN DETAIL THE CONTRASTS BETWEEN THE PRE-EXISTING AND POST-CRIME CONDITIONS OF THE DOOR OR BY CALLING AN EXPERT WITNESS TO SHOW THAT THE POST-CRIME CONDITION OF THE DOOR CLEARLY DEMONSTRATED ENTRY BY FORCIBLE BREAKING. BUT THE PROSECUTOR FAILED BOTH ADEQUATELY TO PROVE THE PRE-CRIME CONDITION AND TO OFFER EXPERT TESTIMONY, INSTEAD IMPROPERLY PROVING HIS CASE BY RELIANCE ON THE INADMISSIBLE NON-EXPERT OPINION OF A LAY WITNESS THAT THE DOOR HAD BEEN "JIMMIED," ON THE CONTENT OF AN INADMISSIBLE HEARSAY LABEL THAT ONE OR MORE JURORS MAY HAVE SEEN, AND ON THE STRENGTH OF IMPERMISSIBLE, UNPROVEN INFERENCES IN HIS SUMMATION. THESE WERE NO SUBSTITUTE FOR THE MISSING EVIDENCE THAT WAS NOT ADDUCED; HENCE, REVERSAL IS REQUIRED.

Appellant's conviction must be reversed and a new trial ordered because legally sufficient properly admissible evidence of a forcible breaking was not offered. On the facts of this case, the prosecutor could have sustained his burden only by either proving in detail the contrasts between the pre-existing and post-crime conditions of the door or by calling an expert witness to show that the post-crime condition of the door clearly demonstrated entry by forcible breaking. But the

prosecutor failed both adequately to prove the pre-crime condition and to offer expert testimony, instead improperly proving his case by reliance on the inadmissible non-expert opinion of a lay witness that the door had been "jimmied," on the content of an inadmissible hearsay label that one or more jurors may have seen, and on the strength of impermissible, unproven inferences in his summation. These were no substitute for the missing evidence that was not adduced; hence, reversal is required.

Section 2115 of Title 18 U.S.C. reads as follows:

"Whoever forcibly breaks into or attempts to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building or part thereof, so used, any larceny or other depredation, shall be fined not more than \$1,000 or imprisoned not more than five years, or both."

"Under §2115 forcible entry of a post office must be proved...." Clemas v. United States, 423 F. 2d 461, 462 (8th Cir. 1970). "[T]he essence of the offense charged ... is the forcible breaking...." Smith v. United States, 413 F. 2d 1121, 1124 (5th Cir. 1969); Schwylhart v. United States, 82 F. 2d 725 (8th Cir. 1936).

"Thus, to prove the corpus delecti there must be substantial evidence to show affirmatively and beyond a reasonable doubt that there was a breaking...."

Smith v. United States, supra at 1124. It is submitted that there is no such substantial admissible evidence in the instant record to prove a forcible breaking; thus, appellant's conviction must be reversed and a new trial ordered.

The following is all of the trial evidence, admissible and inadmissible, bearing on the issue of a forcible breaking in the instant case:

At A-17-18 it was stipulated that "the United States Postal Station was in good order" when the last postal employee left before the crime.

At A-35 Police Officer Seton-Harris testified, immediately following the denial of counsel's objection: "[T]he side door had been jimmied."

At A-36 Government's Exhibit 28, a photograph, was alleged to fairly represent the condition of the side door after the crime.

At A-39 Government's Exhibit 27 was identified as a "small pry-bar."

At A-47 it was conceded that appellant was never seen in possession of the prybar.

At A-48 it was conceded that appellant was not seen entering the post office building.

At A-71 Police Officer Ames testified that he found the prybar "right at the hole in the fence," nowhere near where appellant was arrested.

At A-75 Police Officer Ames testified that "there were marks around the lock" of the side door; an objection was sustained to the further inquiry, "Could it have been jimmied?".

Inspection of Government's Exhibit 28 shows absolutely no marks on or damage to the doorknob, wherein the lock is located, of the side door. There is a single wide scrape on the door itself, as well as a miniscule bending back of the strip just above the doorknob, with a single screw missing.

Based on only the above proof, the prosecutor argued to the jury at pages 108 and 109 of the trial transcript:

"You recall I asked him, "Did you check to see the outside of the door?", and he said, "Yes." I asked him what had happened. He said it appeared that someone had tried to open it.

"Government Exhibit 28 in evidence -- take a look at it if you have any questions.

Does that look like a door that was jimmied forcibly? Take a look at this picture and take a look at this tool. The two of them match up.

"Ladies and gentlemen, you have to use your common sense. This is a case of common sense. What would a reasonable man expect from a tool like this and condition of this door? This had something to do with the condition of this door."

But the prosecutor's argument is simply no substitute for evidentiary proof of the "corpus delecti" --

"substantial evidence to show affirmatively and beyond a reasonable doubt that there was a breaking...."

Smith v. United States, supra at 1124.

In the Smith case, supra at 1124, although there was no demonstration at all of the pre-existing condition, there was an "illuminating description" of the post-crime condition suggestive only of a breaking:

"The rear door of the store was standing -- was partially open, bearing evidence that the lock was forced. The screws holding the hasps of the lock had been pried out. There was evidence of this having been pried out with some kind of a pry tool."

The instant facts, to the contrary, are far more equivocal. The concession that the post office was "in good order" prior to the crime does not clearly conflict with the admissible evidence as to the condition of the side door after the crime. Notwithstanding

the testimony of Officer Ames, Government's Exhibit 28 shows that there were in fact no marks around the lock, which is located in the doorknob. The existence of a single wide scrape on a door is of course evidence of nothing. Likewise, the absence of only a single screw, along with the slight bending back of the strip on the door, is as much proof that the door was old as it is that the door was tampered with; and the conflicting inferences had to be resolved in appellant's favor. Here, unlike Smith, notwithstanding the existence of the prybar found outdoors by the fence, there was no proof that anything had

"been pried out with some kind of a pry tool." Perhaps, more specific testimony as to the pre-existing condition of the door could have remedied the present defect in the proof; but there was in fact no testimony in the record beyond that the building was "in good order," a concession not materially in conflict with the proven post-crime condition of the door.

The only legally sufficient alternative here to the absent testimony necessary to show a breaking by contrasting the pre-existing to the post-crime conditions of the side door would have been the testimony

of an expert witness that the post-crime condition of the door clearly indicated a breaking. But here there is no such evidence in the record. The testimony of Officer Seton-Harris that "the side door had been jimmied" was absolutely inadmissible over the objection thereto; and, regardless of objection to its admissibility*, it was incompetent and altogether non-probative, as the conclusion of a non-expert witness regarding the material facts.

"In criminal cases, conclusions of nonexpert witnesses embracing the essential elements to be proven cannot be said to constitute substantial evidence upon which a jury may be permitted to base a verdict of guilty. Sorenson v. United States, *supra*; Berry v. United States (C.C.A.) 275 F. 680; Little v. Commonwealth, 151 Ky. 520, 152 S.W. 569, 570; Wallace v. Commonwealth, 162 Ky. 85, 172 S. W. 118; Hicks v. State, 23 Ala. App. 507, 128 So. 115; People v. Butman, 357 Ill. 506, 192 N. E. 564."

Schwychart v. United States, *supra* at 727.

In sustaining the unequivocal objection to Officer Ames' testimony about jimmying at A-75, Judge Weinstein recognized that this was not a proper subject for the opinion of a non-expert.

*It is submitted that appellant's objection at A-35, although specifically directed to another phrase of the same sentence of the testimony, was sufficient to preserve this issue, if it need be preserved at all; for counsel cannot realistically be expected to rise to object and move to strike a second time during the same sentence of the same answer, when his first objection and motion have been unequivocally denied by the trial judge.

"This was an opinion of unqualified witnesses, which was not based upon nor supported by any established facts, physical or otherwise."

Schwyhart v. United States, supra at 727. After all, according to Webster's Seventh New Collegiate Dictionary, the verb "jimmy" means "to force open with or as if with a jimmy," while the noun "jimmy" means "a short crowbar." See also United States ex rel. Guarino v. Uhl, 27 F. Supp. 135 (D.C.S.D.N.Y.), rev'd on other grounds, 107 F.2d 399 (2d Cir. 1939); People v. Thompson, 33 App. Div. 197, 53 N. Y. Supp. 497 (1st Dept. 1898); People v. Reilly, 49 App. Div. 218, 63 N.Y. Supp. 18 (1st Dept. 1900); People v. Birnbaum, 208 App. Div. 476, 203 N.Y. Supp. 697 (1st Dept. 1924).

Thus, to allow a non-expert witness to testify that a door had been "jimmied" was improperly to permit him to give his opinion that the door had been opened with a prybar, exactly the material factual and legal issue in this case. It was thus reversible error for the trial judge to have permitted Officer Seton-Harris to give incompetent testimony, as to the jimmying of the side door.

Even if this was not reversible error but only the incompetent opinion of a non-expert, this sole evidence in the record of forcible breaking is not such "upon which a jury may be permitted to base a verdict

of guilty." Schwartz v. United States, supra at 727.

"It leaves the proof of the corpus delicti entirely conjectural because it fails to show affirmatively a forcible entry."

Ibid. But without the inadmissible evidence of "jimmying," all that remains in the record to prove a forcible breaking by appellant that no one witnessed is a prybar, found by the fence, that no one saw used, a vague concession that the post office was "in good order" prior to the crime, testimony that "there were marks around the lock" that is contradicted by the photograph in evidence, a photograph that cannot be said to prove a forcible breaking beyond a reasonable doubt but only an old door, and the fact that appellant was seen leaving the premises. Since no one even saw appellant at all as he entered the premises, since he was never seen in possession of the prybar, and since there was insufficient proof of a forcible breaking, the conviction must be overturned.

Indeed, there were at least two other means by which the prosecutor sought, impermissibly, to fill the gap left in his evidence by the failure to call the necessary expert witness and/or more substantially to demonstrate the pre-existing condition of the door.

First, in his summation the prosecutor attempted to be his own expert witness by suggesting that the prybar had made the mark on the door, i.e., that the door "was jimmied forcibly." But that was a proper subject only for expert opinion in the absence here of a clear demonstration that the pre-existing condition of the door had materially changed as a result of the crime. Here, if the police officers could not offer lay opinions sufficient to justify a conviction, neither could the prosecutor substitute his own inferences for those properly to be made only by the expert witness whom he neglected to call. In short, the prosecutor's summation could not substitute for legally admissible and legally sufficient evidence that the side door of the post office had been forcibly broken.

But this was not the most egregious error in the record. That, rather, was the unintentional admission into evidence of hearsay, presumably unnoticed by all counsel and by the trial judge, which, if it was noticed by any member of the jury, must inalterably have led to a guilty verdict without the necessity of any expert testimony at all. At A-39 Government's Exhibit 27 was identified as a "small pry-bar." At A-41 the

prybar was received in evidence, along with the other tools found in and around the premises. At A-47 the prosecutor noted that the tools, including the prybar, were "on this table that are in front of the jury..." (emphasis added). Thus, it may well be that one or more of the jurors were able to read all or part of what was inscribed on the prybar's label:

"Stanley Wonder Bar

"*Pulls

"*Pries

"*Lifts

"*Scrapes

".Contoured to permit many different pulling, prying and lifting jobs such as: removing wood trim and sash, shingles and siding, wall paneling and flooring..." (emphases added).

If any jurors read that entirely hearsay and inadmissible label, as they might have either while in the jury box or while walking thereto or therefrom, there was surely no point to the rest of the trial. A bit of accidentally admitted hearsay would then have made utterly unnecessary any expert or other opinion or proof as to whether there was a forcible breaking. It can never be known whether any juror read the prybar's label; but, if so, the effect on the jury's view of the

case would necessarily be so extreme as to make the reception of the prybar's label into evidence in this case egregious and reversible error, even in the absence of objection. Since it can never be known whether appellant's conviction was the result of this accidental admission of hearsay, the verdict cannot stand.

Thus, both because sufficient legally admissible evidence of forcible breaking cannot be found in the record and because there are two instances where inadmissible evidence of forcible breaking was admitted, appellant's conviction must be reversed and a new trial ordered.

POINT II

PURSUANT TO F.R. APP. P. 28 (i) SCHMANSKI
INCORPORATES BY REFERENCE ALL POINTS AND
ARGUMENTS RAISED BY THE APPELLANT
DI GIOVANNI INsofar AS THEY ARE APPLICABLE
TO HIM.

CONCLUSION

In support of the indictment, the prosecutor introduced inadmissible evidence of forcible breaking and failed to introduce legally sufficient properly admissible evidence thereof. Therefore, the conviction must be reversed and a new trial ordered.

Respectfully submitted,

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Attorneys for Defendant-Appellant
OTTO SCHMANSKI

Of Counsel
DANIEL MARKEWICH

AFFIDAVIT OF PERSONAL SERVICE ON ATTORNEY

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

CHRISTOPHER KNELL
and says :

being duly sworn, deposes

That I am over the age of 18 years of age and am not a party to the within action.

That on the date indicated below, I served ^{2 copies} ~~a copy~~ of the annexed document on the office of the attorney set forth below, at his office as set forth below by

☐ Leaving a true copy of the foregoing paper with him personally.

☒ Leaving a true copy of the foregoing paper with a person in charge of said attorney's office, his office being open at the time.

☐ Leaving a true copy of the foregoing paper in a conspicuous place within his office, no person being in charge of said office at the time or present and accepting service although his office was open.

☐ Depositing a true copy of the foregoing paper in a sealed wrapper directed to him in his office letter box or drop, his office not being open at the time.

Date: April 20, 1977

Document: Brief for Appellant
Otto Schmanski
Attorney for

Attorney and Address

Herbert I. Handman
16 West 68 Street
New York, NY 10023

Appellant Peter Di Giovanni

SWORN to before me this
21 day of April, 1977.

Anne R. Okin

ANNE R. OKIN
Commissioner of Deeds
City of New York 1-1104
Certificate filed in New York Co.
Commission Expires May 1 1978

Christopher Knell

AFFIDAVIT OF PERSONAL SERVICE ON ATTORNEY

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

JON QUINT
and says :

being duly sworn, deposes

That I am over the age of 18 years of age and am not a party to the within action.

That on the date indicated below, I served ² copies of the annexed document on the office of the attorney set forth below, at his office as set forth below by

- ☐ Leaving a true copy of the foregoing paper with him personally.
- ☒ Leaving a true copy of the foregoing paper with a person in charge of said attorney's office, his office being open at the time.
- ☐ Leaving a true copy of the foregoing paper in a conspicuous place within his office, no person being in charge of said office at the time or present and accepting service although his office was open.
- ☐ Depositing a true copy of the foregoing paper in a sealed wrapper directed to him in his office letter box or drop, his office not being open at the time.

Date: April 21, 1977

Document: Brief for Appellant
Otto Schmanski
Attorney for

Attorney and Address

David G. Trager, ESq.
225 Cadman Plaza East
Brooklyn, NY

United States Attorney

SWORN to before me this
21st day of April, 1977.

Margarita Padilla

MARGARITA PADILLA
Notary Public, State of New York
No. 24-4519924
Qualified in Kings County
Term Expires March 30, 1978

